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No. 90-737

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

DAVID B. ZAVADIL and BARBARA ZAVADIL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioners' action under the Federal Tort Claims Act for damages arising from injuries suffered in a lake created by a federal flood control dam.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Boyd v. *United States*, 881 F.2d 895 (10th Cir. 1989) 8, 9

Dawson v. *United States*, 894 F.2d 70 (3d Cir. 1990) 4, 5, 9

Denham v. *United States*, 646 F. Supp. 1021 (W.D. Tex. 1986), aff'd, 834 F.2d 518 (5th Cir. 1987) 5

Dewitt Bank & Trust Co. v. *United States*, 878 F.2d 246 (8th Cir. 1989), cert. denied, 110 S. Ct. 1318 (1990) 4, 5, 10

Fryman v. *United States*, 901 F.2d 79 (7th Cir.), cert. denied, 111 S. Ct. 295 (1990) 4, 5, 7, 10

Hayes v. *United States*, 585 F.2d 701 (4th Cir. 1978) 7-8, 11

James v. *United States*, 760 F.2d 590 (5th Cir. 1985), rev'd, 478 U.S. 597 (1986) 7

McCarthy v. *United States*, 850 F.2d 558 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989) .. 4, 5, 7, 9, 10

Mocklin v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) 4, 5, 10

Morici Corp. v. *United States*, 681 F.2d 645 (9th Cir. 1982) 8

National Mfg. Co. v. *United States*, 210 F.2d 263 (8th Cir.), cert. denied, 347 U.S. 967 (1954) 6

United States v. *James*, 478 U.S. 597 (1986) 3, 4, 5, 6, 7, 11

Statutes and regulation: Page

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*.... 3
Flood Control Act of 1928, 33 U.S.C. 702c....2, 3, 4, 5, 6, 7, 9, 10, 11
36 C.F.R. 327.5(a) 2

Miscellaneous:

S. Doc. No. 247, 78th Cong., 2d Sess. (1944) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 908 F.2d 334. The opinion of the district court (Pet. App. A7-A15) is reported at 715 F. Supp. 276.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1990. The petition for a writ of certiorari was filed on October 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner David Zavadil was seriously injured when he dove from a dock into a federal flood control lake and struck a submerged concrete boat ramp. The district court dismissed the complaint, holding that it was barred by the Flood Control Act of 1928, 33 U.S.C. 702c. Pet. App. A7-A12. The court of appeals affirmed. *Id.* at A1-A6.

1. Lewis and Clark Lake, which is located between Nebraska and South Dakota, consists of waters confined by the Gavins Point Dam on the Missouri River. Pet. App. A2. The Army Corps of Engineers built the dam and continues to own and operate it. *Ibid.* The dam was constructed as part of the Pick-Sloan plan for the development of the Missouri River basin. *Id.* at A8. When Congress authorized the construction of the dam, it made clear that the dam's purposes included flood control:

> The use of the Garrison, High, Oahe, Big Bend, Fort Randall and Gavins Point Dams and Reservoirs will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

Pet. App. A8-A9 (quoting S. Doc. No. 247, 78th Cong., 2d Sess. 3-4 (1944)). The Corps of Engineers monitors the water level in the lake and adjusts water discharge rates when necessary for the dam's purposes, including flood control. Pet. App. A4.

There are recreational areas on the lake. Petitioner was injured at one of those areas when he dove into the lake from a dock. Pet. App. A2. The Corps' regulations prohibited diving at the site of the injury, 36 C.F.R. 327.5(a), and there was a sign at the end of the dock warning members of the public

to swim only in designated areas, to wear a life preserver, and to be alert for underwater obstructions. Gov't C.A. Br. 6. Petitioners have alleged that the government was negligent in failing to make the public aware of, and to enforce, the regulation. See Pet. 6-7.

2. Petitioners filed an action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the District of Nebraska, alleging that the government's negligence caused the injury. The government moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the United States was immune under the Flood Control Act of 1928, 33 U.S.C. 702c. The district court granted the motion, holding that Section 702c barred the suit. Pet. App. A7-A12.

Section 702 provides, in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *.

The district court noted that this Court had "considered and delineated" the scope of Section 702c in *United States* v. *James*, 478 U.S. 597 (1986); the "clear import of *James*," the district court concluded, was that "§ 702c immunity extends to this case." Pet. App. A9-A10.

3. The court of appeals affirmed, holding that *James* was "controlling in this case." Pet. App. A4. The court found that "[t]here is no question that one of the purposes of the Gavins Point Dam was flood control" and that "[t]he record shows that at the time of the accident the water level was being monitored for flood control and navigational purposes." *Ibid.* Thus, the court concluded, "the lake's waters are 'contained in * * * a federal flood control project

for purposes of or related to flood control' " and "section 702c is applicable." *Id.* at A4-A5 (quoting *James*, 478 U.S. at 605). "Since governmental control of these waters was a substantial factor in causing [petitioners'] injuries," the court held, "the United States is immune from liability." Pet. App. A5.

ARGUMENT

As petitioners note (Pet. ii), this case presents the same question that the Court declined to hear earlier this Term in *Fryman* v. *United States*, 111 S. Ct. 295 (1990) (No. 90-147). There is no conflict among the circuits that calls for this Court's review, and, as both lower courts held, the reasoning of *James* mandated dismissal of the action. Further review is not warranted.

1. This is the latest in a series of cases in which Section 702c has been held to bar claims arising from recreational accidents in federal flood control lakes. In addition to the Eighth Circuit, the Third, Seventh, and Ninth Circuits have concluded that Section 702c confers immunity from claims arising from alleged negligence in the operation of recreational facilities included within federal flood control projects. See *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990); *Fryman* v. *United States*, 901 F.2d 79 (7th Cir.), cert. denied, 111 S. Ct. 295 (1990); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246 (8th Cir. 1989), cert. denied, 110 S. Ct. 1318 (1990); *McCarthy* v. *United States*, 850 F.2d 558, 561 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989). Similarly, in *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427, 430 n.6 (1989), the Fifth Circuit held that Section 702c foreclosed a claim against the government arising out of a drowning in a channel that

had been dredged to facilitate the movement of equipment needed for the construction of flood control levees.[1]

Like the court of appeals here, the courts in all of those cases concluded that the waters in which the injuries occurred were "flood waters" for purposes of Section 702c; each court also held that the statute, as construed in *James*, conferred immunity on the United States notwithstanding allegations that injuries resulted from negligence unrelated to flood control. Pet. App. A5-A6 & n.4; *Dawson* v *United States*, 894 F.2d at 73-74; *Mocklin* v. *Orleans Levee District*, 877 F.2d at 428-430 & n.6; *Fryman* v. *United States*, 901 F.2d at 81; *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d at 247; *McCarthy* v. *United States*, 850 F.2d at 561-563. (In three of these cases, *Fryman*, *McCarthy*, and *Dewitt*, this Court denied petitions for certiorari seeking further review of the same question as that presented here.)

These decisions are fully justified by the language of the Flood Control Act and by the Court's reasoning in *James*. Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." In *James*, this Court held that the terms "flood" and "flood waters" (478 U.S. at 605)

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[1] In light of *Mocklin*, *Denham* v. *United States*, 646 F. Supp. 1021, 1026 (W.D. Tex. 1986) (limiting flood control immunity to cases in which a plaintiff's injuries are attributable to "the management of a flood control project" or "the operation of [a] dam as a flood control project"), aff'd on other grounds, 834 F.2d 518 (5th Cir. 1987), has no further vitality. Compare Pet. 20-22.

> apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

As the court of appeals noted (Pet. App. A4), there is no question that the waters retained by the Gavins Point Dam in which the injury occurred are encompassed by this definition of "flood waters."

The immunity conferred by Section 702c does not depend on how a plaintiff may seek to characterize the government's negligence. In *James*, this Court stressed that Section 702c extends to liability of "*any* kind * * * for *any* damage from or by floods or flood waters at *any* place" and observed that it is "difficult to imagine broader language." 478 U.S. at 604 (emphasis in original). The legislative history, *James* added, shows "that the sweeping language of § 702c was no drafting inadvertence" and that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." *Id.* at 608. Section 702c "safeguard[s] the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." *Ibid.* (quoting *National Mfg. Co.* v. *United States*, 210 F.2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954)).[2]

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[2] Petitioner strings together brief excerpts from *James* in an attempt to suggest a limitation on the Court's interpretation of the statute. Pet. 17. None of those phrases supports the limitation petitioner advocates. For instance, "related to flood control" appeared in a sentence describing flood waters: "[T]he terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or *related to flood control*, as well as to waters that such projects cannot control." 478 U.S. at 605 (emphasis added).

The immunity for "any damage from or by * * * flood waters" is available even when the government's negligence is said to involve "purely recreational operations" (Pet. 18). Indeed, one of the decisions reversed in *James* had held that the government was not immune if "a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters." *James* v. *United States*, 760 F.2d 590, 603 (5th Cir. 1985). This Court's decision in *James* must be taken as a rejection of that test. Similarly, *James* made clear that Section 702c extends to claims framed in terms of failures to warn recreational users of hazards on flood control lakes, explaining that "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." 478 U.S. at 609-610.

As a practical matter, an interpretation that sought to limit Section 702c to allegedly negligent flood control operations would be unworkable. As the Seventh Circuit recognized in *Fryman*, such an approach would "enable parties to avoid *James* by playing word games." 901 F.2d at 81. The Ninth Circuit has also emphasized the impracticability of attempting to distinguish "between the active and passive operations of federal flood control facilities," recognizing that "a passive condition is invariably the result of other active forces which have gone before." *McCarthy* v. *United States*, 850 F.2d at 561. In this case, the government's immunity should not be affected by the manner in which the complaint characterizes the negligence responsible for the accident. See Pet. 4.

Contrary to petitioner's contention (Pet. 18), *James*'s passing reference—in a string citation in a footnote, 478 U.S. at 605-606 n.7—to *Hayes* v. *United*

States, 585 F.2d 701 (4th Cir. 1978), does not suggest otherwise.[3] As we have demonstrated, the reasoning of *James* is inconsistent with any effort to limit the Flood Control Act to active flood control operations; the Court cannot fairly be deemed to have adopted a fundamentally different understanding of the statute by means of a footnote citation to *Hayes*. In fact, the same footnote cited *Morici Corp.* v. *United States*, 681 F.2d 645 (1982), a case in which the Ninth Circuit specifically rejected the *Hayes* court's suggestion that flood control immunity depends on "the particular use to which the project was being put when the negligence occurred" (681 F.2d at 647).

2. There is no conflict among the courts of appeals calling for this Court's review. In *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989), a swimmer snorkeling in a flood control lake was struck and killed by a power boat; his complaint alleged that the government was negligent in failing to warn swimmers that boating was permitted in the area in which the accident occurred and in failing to zone the lake to prohibit boating in that area. Although the court

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[3] *Hayes* was a two-page decision reversing the dismissal of a complaint that alleged that the plaintiff's land had been eroded by releases of water from a dual-purpose dam. Distinguishing between "flooding which allegedly occurred because of the government's anti-flooding activity" and "flooding caused by a federal project unrelated to flood control," *Hayes* remanded for further proceedings because it was "not inconceivable that all or some of the releases were solely for the purpose of promoting recreational use of the impounded waters and not in the least in aid of the operation of the dam as a flood control facility." 585 F.2d at 702. In the 12 years since *Hayes* was decided, the Fourth Circuit has neither elaborated upon this test nor applied it beyond the facts of *Hayes* itself.

of appeals concluded that Section 702c did not bar the suit and criticized the Ninth Circuit's interpretation of Section 702c,[4] the Tenth Circuit's holding was very narrow (881 F.2d at 900):

> Without attempting to delineate for every conceivable situation the necessary link between flood control activities and injuries sustained at a flood control project before § 702c immunity applies, in the present case we hold that the requisite nexus has not been established.

Although *Boyd* indicated that some "nexus" between flood control activities and injuries at a flood control lake—beyond "but for" causation—would be required to sustain immunity under Section 702c, the Tenth Circuit has never applied its approach beyond the particular facts of *Boyd*. In the instant case, the court of appeals determined that "governmental control of [waters in Lewis and Clark Lake] was a substantial factor in causing [petitioners'] injuries." Pet. App. A5. In view of the decisions that have reached the same conclusion on similar facts, the Tenth Circuit might well regard the "substantial factor" recognized in those cases as establishing the "nexus" required by *Boyd*.[5]

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[4] The Tenth Circuit understood the Ninth Circuit's decision in *McCarthy* v. *United States*, *supra*, to require only a " 'but for' connection between flood control activity and damages occurring at a flood control project." 881 F.2d at 900. The Tenth Circuit maintained that a "but for" standard was inconsistent with its understanding of Section 702c's purpose—"to shield the government from liability associated with flood control operations * * * not liability associated with operating a recreational facility." 881 F.2d 900.

[5] See *Dawson* v. *United States*, 894 F.2d at 74 (noting that "daily variation in the water depth * * * was in part due to

Nor is there any conflict between the decision in this case and the rationale of *Fryman* v. *United States*, *supra*. See Pet. 15-16. In *Fryman*, the Seventh Circuit held that Section 702c barred a claim very similar to petitioners'. Although the *Fryman* court reserved the question "whether a recreational injury on a flood-control lake could be actionable under the FTCA when the flood-control activities did not increase the probability of the injury compared with a natural lake devoted to recreational use" (901 F.2d at 82), the court here determined that governmental control of the waters in Lewis and Clark Lake was a "substantial factor" in causing the injury at issue. Thus, whatever the Seventh Circuit's resolution of the question left open in *Fryman*, there is no

releases by the Corps for flood control purposes"; thus, "'governmental control of flood waters was a substantial factor' in causing" the accident); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d at 428-430 & n.6 (noting that it was "clear * * * that the water in the flotation channel causally did contribute to the [accident]": a channel dredged to facilitate construction of a flood control project "created a significant dropoff in the lake"); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d at 247 ("In operating the project for flood control and navigation, the Corps maintained the waters at this shallow level. Thus, governmental control of flood waters was a substantial factor in causing [the plaintiff's] injuries."); *McCarthy* v. *United States*, 850 F.2d at 561 (noting that "[a]lthough [plaintiff's] injury did not result from a perceptibly active operation of the flood control facility, the record does indicate ongoing monitoring and discharge of water levels at the Lake, activities which even formed part of [the plaintiff's] complaint for negligence"). The cited passages refute petitioners' suggestion (Pet. 15-16) that those cases have adopted widely divergent tests.

reason to believe that court would reach a different result on the facts of this case.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The Fourth Circuit's decision in *Hayes* v. *United States*, *supra*, was decided before this Court's decision in *James*. Since *James*, the Fourth Circuit has not had occasion to consider the significance of that decision or to apply Section 702c. Under these circumstances, there is no need for this Court to address any potential conflict between *Hayes* and decisions of other courts of appeals.

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